SUPREME COURT, U.S.

No. 147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

THE STATE OF WEST VIRGINIA, at the Relation of DR. N. H. DYER, et al., etc., *Petitioners,*

v.

EDGAR B. SIMS, Auditor of the State of West Virginia, *Respondent.*

ON CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR RESPONDENT

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OPINIONS OF STATE COURT

The majority and minority opinions of the Supreme Court of Appeals of West Virginia appear at pages 14 and 32, respectively, of the Record, will be reported in 133 W. Va. , and are currently reported in 58 S. E. (2d) 766 and 777, respectively.

JURISDICTION

Petitioner invokes jurisdiction under 28 U. S. C. A. § 1257(3).

The question of jurisdiction of this Court was briefed on application for certiorari. While Respondent does not concede the point of jurisdiction for the reasons as-

signed in his brief in opposition to the allowance of a writ of certiorari, he is not warranted in filing a motion to dismiss. However, it is respectfully urged that in view of Petitioner's apparent failure to state adequate grounds in support of jurisdiction under the rules that this Court may deem it proper to reconsider the jurisdictional issue because: (1) No Federal question of substance was in issue or decided; (2) In any event, Petitioner utterly failed to rely upon any Federal right, title, privilege or immunity; and (3) Even assuming a Federal question, the decision below rests upon adequate State grounds.

STATEMENT OF THE CASE

Petitioner's statement is intrinsically correct but incomplete. It significantly fails to note that Chapter 38, Acts of the West Virginia Legislature, 1939, not only purported to adopt the Ohio River Valley Water Sanitation Compact, but, in addition and supplemental thereto, said Act provided:

1. Section 3 granted not only to the Commission but to the Commissioners individually, twenty-four of whom are non-residents of the State, "all the powers provided for in the said compact and all the powers necessary or incidental to the carrying out of said compact in every particular";

2. Section 4 expressly provided that the powers granted by such Chapter are supplemental to and in aid of any powers vested in the Commission by the laws of any other State, the Congress, or the terms of the Compact; and

3. Section 5 thereof not only provided for reimbursement of the Commissioners, but binds future Legislatures in perpetuity by the provision that:

> "There shall be appropriated to the commission out of any moneys in the state treasury unexpended and available therefor, and not otherwise

appropriated, such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportion of the state of West Virginia of the annual budget of the 'Ohio River Valley Water Sanitation Commission' in accordance with article ten of said compact."

It was the whole of Chapter 38, Acts of the West Virginia Legislature, 1939, which the State Court held unwarranted and void, rather than Section 1, which deals with the Compact itself.

ASSIGNMENT OF ERRORS

The brief for the Petitioner does not contain a specification of assigned errors but in lieu thereof poses four questions for consideration which are inaccurate and misleading and are not properly raised in this proceeding.

SUMMARY OF ARGUMENT

I.

The sole issue in this case is the right of the West Virginia State Court to apply its Constitution to Chapter 38 Acts of the West Virginia Legislature, 1939. This Act contains broad and unconstitutional provisions going far beyond the terms of the Compact which such Act purported to ratify. The State Court passed upon the enabling act and not upon the Compact standing alone.

Neither the propriety nor the constitutionality of interstate compacts is in issue. Both the State Court and Respondent affirmatively recognize the desirability and necessity of interstate compacts, including a properly drawn compact to deal with the important problem of stream pollution in the Ohio River basin.

II.

The vitiating provisions of the Act are found in Sections 3 and 5 of Chapter 38, Acts of the Legislature, 1939.

in far greater degree than contained in the Compact itself. Section 3 surrenders unlimited police powers not only to the Commission but to the Commissioners individually. Section 5 purports to bind future Legislatures to appropriate funds without limit as to time. These "extra-compact" provisions of the enabling Act were properly held unconstitutional by the State Court because (1) Article X, Section 4, of the West Virginia Constitution prohibits *without exception* the incurring of a "debt" or "liability" for such purposes; and (2) the police power of the State cannot be abridged or delegated—either in perpetuity or without adequate legislative standards. The Act is void in both particulars.

III.

This Court will not review the judgment of a State Court where the validity of an act of a Legislature under the Constitution of that State was at issue. Conditions precedent to taking jurisdiction in such cases are: (1) that a federal right was in issue, (2) that such federal right was relied upon in the Court below and (3) that the decision of the State Court upon such federal right is properly assigned as error. Petitioner fails completely to meet these requirements. Furthermore, it is well established that this Court will not exercise its powers of judicial review where the judgment of a State Court rests upon adequate and independent State grounds. The rule has long been adhered to that a State Court is the final and exclusive arbiter of its internal fiscal affairs and of delegation of the police power of the State. Assuming that the State Court did give incidental consideration to the terms of the Compact, nevertheless there is no substantial ground for invoking the power of judicial review of this Court.

Moreover, Congressional consent to the making of the Compact does not eliminate the necessity of the West

Virginia Legislature's acting within the limits of its State Constitution; for under our federal system and the decisions of this and other Courts, an interstate compact must be drafted and entered into so as to conform to both the Federal and State Constitutions.

IV.

Petitioner's theories threaten State sovereignty and the Federal system. It is essential to maintain a proper balance between the Federal and State Governments; and yet, counter to all authority Petitioner asserts that the consent of Congress to a compact *per se* annihilates the force of State Constitutions, statutes and courts. Thereupon the Legislature becomes free without any limitation to compact at will. Carrying Petitioner's startling theory to its logical conclusion, it follows that the hybrid commission created by the Compact in question would likewise be beyond control of State law and such commission could exercise upon the people of the States involved its authoritarian powers. It is submitted that the very arguments used by Petitioner demonstrate conclusively the error of Petitioner's entire case.

This Court will not make a new contract for the States. Yet it is argued that by a multitude of suggested interpretations and constructions, the Compact can be "watered down" to conform to constitutional limitations. Not only does this view ignore the fact that it is the enabling Act, which the State Court holds invalid, but, moreover, adoption of the many necessary interpretations to that end is tantamount to the making of a new contract between the parties by a court with terms and provisions not contemplated by the signatory States.

Respondent's sole interest is the performance of his sworn duty to see that the public funds of the State are expended only in accordance with the Constitution. The observance of this requirement is essential to the preser-

vation of the State government, and, in this instance, may lead to the drawing of a proper and more effective compact for alleviating the important problem of stream pollution in the Ohio basin and, at the same time, leave the States free to experiment with new devices to meet the ever changing problem.

ARGUMENT

I.

THE SOLE ISSUE IN THIS CASE IS THE RIGHT OF A STATE TO APPLY ITS OWN CONSTITUTION—NOT THE PROPRIETY OR CONSTITUTIONALITY OF COMPACTS.

1. The State Court did not hold the Compact unconstitutional.

Contrary to the views of Petitioner and *amici curiae*, who misconceive the holding of the State Court, the sole question here is the judicial review of an enabling Act of the West Virginia Legislature, which not only purports to ratify the Compact, but in addition obligates the State to surrender too much of its essential attributes of State sovereignty.

Chapter 38, Acts of the Legislature, 1939, contains verbatim the language of the Compact in the first section, but the same Act in four succeeding sections goes far beyond the Compact to provide for additional grants of the police power of the State of West Virginia and to bind, without limit as to time or otherwise, future Legislatures to make appropriations.

It is plain from the opinion of the Court that its decision involved only the narrow issue of the validity of the enabling Act itself and did not involve either the construction or constitutionality of the Compact as such.

The State Court unequivocally states: "The sole question to be determined in this proceeding is the power of the Legislature of this State to enact Chapter 38, Acts

of the Legislature, 1939." (R. p. 21). Furthermore, the Compact is not even mentioned in any of the syllabi, which under the West Virginia Constitution the Court is required to prepare of all the points adjudicated in each case. See Constitution of West Virginia, Article VIII, § 5.

Moreover, the opinion of the State Court quotes the relevant provisions of Section 3 of the Act which grants to the Commissioners individually all of the powers of the Compact and the additional ones provided in the enabling Act; and also, Section 5 thereof which binds future Legislatures of the State to appropriate "such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act * * *". (R. pp. 17, 18).

That the State Court, as was proper, examined the language of the Compact is not denied because it was incorporated in the enabling Act; but, the Court unmistakably holds that it is the enabling Act which constitutes an unwarranted exercise of legislative power, rather than any particular provision of the Compact. The terms of the Compact are but one part of the Act and such terms in comparison with the other provisions of the Act contain in far less degree the vices therein. Even if it be assumed that the State Court singled out provisions of the Compact itself, it is equally clear that the Court was not troubled by any problem of interpretation or construction, but merely took what would appear to all reasonable minds to be unmistakably plain and unambiguous provisions of the Compact and tested them in the light of the Constitution of West Virginia.

It thus appears that the State Court held the enabling Act beyond the power and capacity of its Legislature upon the totality of its terms and did not construe or pass upon the validity of the Compact as such.

2. Both the State Court and Respondent recognize the desirability and necessity of interstate compacts.

Interstate compacts as such are not in issue here, but rather whether the terms thereof must conform to our existing constitutional framework. Students of government have universally recognized that since colonial days interstate compacts have grown in both number and breadth of scope into an increasingly useful means of solving problems common to two or more States. See Frankfurter and Landis: "The Compact Clause of The Constitution—A Study In Interstate Adjustments", 34 Yale L. J. 685. The State Court likewise recognizes the propriety and necessity of interstate compacts, and specifically in this case concludes that:

> "Here we have a most worthy enterprise, that of guarding against the pollution of our streams, and providing for the safety and health of our people by the restoration of our streams, to some extent, to their original purity, * * *. We realize that in this instance the purpose in view can only be worked out through cooperation between the states drained in whole or in part by the Ohio River and its tributaries." (R. pp. 31, 32).

Petitioner and *amici curiae* obfuscate the real issue by making broadside charges indicating that the State Court and Respondent are seeking to undermine and, in effect, destroy not only the Ohio Basin Compact, but also to impair the scores of compacts already in existence. These charges are wholly unwarranted. The facts are that Respondent, in support of his position in the State Court, not only cited and relied upon the article by Frankfurter and Landis, *supra*, for the purpose of showing how the important problem of pollution in the Ohio Basin could be controlled by a proper and lawful interstate compact, but in addition made reference to the many modern compacts now in existence, the terms of which without

question would be constitutional under the present holding of the Supreme Court of West Virginia. Most of the cases which have arisen respecting interstate compacts are annotated in 134 A. L. R. 1411. It is significant that generally such compacts for interstate cooperation provide that Commissioners from the respective States signatory thereto shall meet, agree upon and recommend to the Legislatures of such States the adoption of uniform legislation covering the subject matter. The typical compact does not contain any broad surrender of the police powers of a State, not does it purport to bind the parties thereto in perpetuity to appropriate funds in support thereof in accordance with the budget fixed by the Commissions created thereby.

Respondent particularly relied in the State Court upon the Interstate Commission on the Potomac River Basin Compact, ratified two years after the Ohio Basin Compact, by West Virginia in Chapter 81, Acts of the Legislature, 1941, 33 U. S. C. A. 567b, 54 Stat. 748, as an outstanding example of a well-drawn contract. The powers of the Potomac Commission are clearly limited to the collection of technical data, making additional technical investigations, *cooperation* with the legislative agencies of the States to the Compact, the dissemination of public information and the recommendation of standards for treatment of sewage and industrial wastes to the proper authorities in each State which signed the Compact. The Potomac Basin Compact does not contain any purported delegation of police power to the Commission, contains no exercise of the State's police powers upon municipalities, industries and other public and private entities, no requirement as to the enactment of future legislation, no provision granting extra-territorial jurisdiction to the courts of this and other States and of the United States, no requirement as to loan of personnel, no pledge by the State to make future appropriations in perpetuity; and of

great significance, the Potomac Compact provides that after one year's notice to the Commission any State may withdraw from the Compact.

It cannot be gainsaid, therefore, that the decision of the State Court merely holds an enabling Act of its own Legislature to be unconstitutional and in nowise impairs the right of the State of West Virginia or any other State to enter into a properly drawn compact. The State Court, while recognizing fully the values and rich potentialities of the device of the interstate compact, at the same time reluctantly but necessarily concluded that the Legislature of West Virginia was bound to contract within the plain limitations of its State Constitution.

II.

THE STATE COURT IN REVIEWING THIS ENABLING ACT OF ITS LEGISLATURE PROPERLY HELD IT UNCONSTITUTIONAL.

1. Chapter 38, Acts of the West Virginia Legislature, 1939, created a debt and liability prohibited by Article X, § 4, of the Constitution of West Virginia.

Article X of the Compact provides: "The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States. * * *"

Section 5 of Chapter 38, Acts of the Legislature, 1939, over and above the terms of the Compact, provides that:

> "The commissioners shall be reimbursed out of moneys appropriated for such purposes, all sums which they necessarily shall expend in the discharge of their duties as members of such commission.
>
> "There shall be appropriated to the commission out of any moneys in the state treasury unex-

> pended and available therefor, and not otherwise appropriated, such sums as may be necessary for the uses and purposes of the commission in carrying out the provisions of this act and the payment of the proper proportion of the state of West Virginia of the annual budget of the 'Ohio River Valley Water Sanitation Commission' in accordance with article ten of said compact."

There is little doubt that the foregoing provisions are unconstitutional.

Article X of the West Virginia Constitution deals with the important subjects of taxation and finance. Section 4 provides:

> "*No debt* shall be contracted by this State * * *". (except for specifically named purposes, not including an interstate compact, and then makes the further provision that) "* * * the payment of *any liability* other than for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years." (Italics supplied.)

The terms "no debt" and "any liability" are plainly used in their broadest generic sense and are not susceptible of an interpretation that will permit the Legislature to incur the obligations inherent in Chapter 38, Acts of the Legislature, 1939. The State Court expressly holds that the passage of such Act "bound future Legislatures to make appropriations * * * and * * amounts to the creation of a debt inhibited by Section 4 of Article X of our State Constitution". (R. p. 29.) Petitioner argues that the obligation created by the Compact is not technically a debt. Even assuming that such position is correct, the State Constitution in equally emphatic terms prohibits the incurring or payment of "any liability".

Petitioner, in seeking to support its erroneous position, quotes copiously from *Bates* v. *State Bridge Com-*

mission, 109 W. Va. 186, 153 S. E. 305, (1930). (Br. p. 20.) The very wording of this decision shows Petitioner to be in error. The last sentence of Petitioner's quotation is "The debts against which the prohibition lies are those for which suit may be maintained or the state's revenues and resources pledged or sequestered.", and thus clearly reveals that there is no exception to the compelling language of the Constitution.

Moreover, Petitioner seeks to emasculate the obligations contained in Article X of the Compact by naively suggesting that they should be construed "* * * as merely a declaration on the part of each signatory State of the intention to seek and to assert every effort to obtain from its Legislature the periodic appropriation of its proportion. * * *". (Br. p. 27.) Significantly, Petitioner is likewise careful to ignore the important provisions of Section 5 of Chapter 38, which plainly bound future Legislatures to appropriate funds contrary to the State Constitution.

2. The enabling Act unconstitutionally surrendered the sovereign police power of the States.

In accord with universal holdings of this and other Courts, the police power under our constitutional system is reserved to the States where it is exercisable by the legislative branch. This police power can neither be surrendered nor abridged.

State v. *Bunner*, 126 W. Va. 280, 282, 27 S. E. 2d 823;

Mumpower v. *Housing Authority*, 176 Va. 426, 11 S. E. 2d 732;

1 Cooley's Constitutional Limitations (8th ed.) 436;

2 Cooley's Constitutional Limitations (8th ed.) 1223.

The enabling Act in question supplemented the provisions of the Compact by providing not only that the Commission but the Commissioners individually should have "all the powers provided for in the said compact and all the powers necessary or incidental to the carrying out of said compact in every particular." The succeeding Section 4 of Chapter 38 emphasizes that additional powers are granted by the enabling Act beyond those provided in the Compact in aid of and supplemental to those vested in the Commission by the Compact, the laws of all other States signatory thereto and the Congress.

The enabling Act went beyond State constitutional limitations in surrendering the police power of West Virginia in the following particulars:

1. After providing a standard in Article VI of the Compact to the effect that forty-five per cent of total suspended solids shall be removed by anyone discharging sewage into any water in the Ohio River basin within a reasonable time, the Commission is authorized to fix such higher degree of treatment as it may determine to be necessary. No standards are provided to guide the Commission in such matter. As to industrial wastes, *unlimited discretion* is given the Commission. Therefore, adequate legislative standards are not provided under the rule of *State* v. *Bunner*, *supra*, p. 12, upon which Petitioner relies, and many other cases cited therein, in which the Court states:

> "* * * We have held that, in creating administrative machinery for the regulation of a business, the legislature itself must set up standards and definite limitations under which the administrative body may act, and must leave to it only the power to regulate and prescribe details, which are to be measured by the 'standards' so established by the legislative act. * * *."

2. No provision is made requiring uniformity or generality in any order of the Commission; on the contrary, it appears that the Commission not only can but is expected to make such orders as it sees fit in each individual case.

3. The Commission is made the fact finder, the legislator of standards, the hearing tribunal, and furthermore it is authorized to carry out these functions under such rules and regulations as it may in its absolute discretion establish and there is no provision that such rules and regulations themselves shall be of uniform character and application. In short, the Commission is the investigator, the law-maker, the prosecutor and the judge to a degree unprecedented in an era which has sanctioned the grant to administrative bodies of vast powers.

4. Article IX of the Compact purports to grant to any court of general jurisdiction and any United States District Court in any of the eight States signing the Compact jurisdiction by extraordinary remedy to enforce any order of the Commission against any person, public or private, "* * * domiciled or located within such state, or whose discharge of the waste takes place within or *adjoining such state* * * *." (Italics supplied.) This unprecedented grant of jurisdiction purports to authorize any Federal District Court in West Virginia or any court of general jurisdiction in that State to enforce an order against a person domiciled or located either in West Virginia or in any State adjoining West Virginia if such person or entity discharges waste from this or an adjoining State. This language of the Compact clearly attempts to grant extra-territorial jurisdiction to courts. If a person in West Virginia discharged waste in a tributary of the Ohio River and failed to obey an order of the Commission, he could, under the language quoted, be hailed into any Federal or State Court of general juris-

diction in Pennsylvania, Ohio, Virginia or Kentucky, in addition to such courts of the State of his domicile. This provision of the Compact is a startlingly new concept of government wholly foreign to the American constitutional system, which recognizes that courts of a State are limited to the territory of that State.

Pennoyer v. *Neff*, 94 U. S. 714. 24 L. ed. 565;

International Shoe Co. v. *Washington*, 326 U. S. 319, 161 A. L. R. 1057;

Riverside etc. v. *Menefee*, 237 U. S. 189, 59 L. ed. 910;

Cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318.

5. Section 3, Chapter 38, Acts of the Legislature, 1939, over and above the provisions of the Compact, purports to give the same broad governmental powers not only to the Commission but to each Commissioner, irrespective of the fact that twenty-four of them are neither residents nor officers of the State of West Virginia. In this connection, it should be noted that the Supreme Court of West Virginia holds in this case that the broad powers purported to be granted by the Act in question would not be constitutional even if a purely State Commission were involved. (R. pp. 30, 31.)

6. The Commission in this instance, unlike the typical commission created in other compacts involving interstate cooperation, is expressly vested with very broad police powers affecting health, life and property of citizens of many States. This unique Commission as such is not a creature of any one State nor of the Federal Government, but in effect, is a super-sovereignty deriving its extraordinary powers from eight States and the Federal Government, subject to few, if any, limitations in the Compact and, if Petitioner's theories are to be

believed, not subject to the laws or Constitutions of any of the States.

7. No State Legislature may bind or abridge the power of any future Legislature respecting the exercise of its police and legislative powers.

In *Stone* v. *Mississippi*, 101 U. S. 814. 25 L. ed. 1079 (1879), the Court considered this question and held:

> "* * * If the Legislature that granted this charter had the power to bind the people of the State and all succeeding Legislatures * * * there is no doubt about the sufficiency of the language * * *."
>
> "*All agree that the Legislature cannot bargain away the police power of a State. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police'.*" (Italics supplied.)

It is equally well established that a State Legislature cannot part with the discretionary power of determining when, to what extent, and under what circumstances the police power may properly be exercised as was clearly attempted in the enabling Act in the instant controversy.

Texas etc. R. Co. v. *Miller*, 221 U. S. 408, 55 L. ed. 789;

St. Louis etc. R. Co. v. *Mathews*, 165 U. S. 1, 41 L. ed. 611;

Butchers Union S. H. & L. S. L. Co. v. *Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 28 L. ed. 585;

Sutherland v. *Miller*, 79 W. Va. 796, 91 S. E. 993, L. R. A. 1917D, 1040; and

See Annotation, 71 A. L. R. 604, and 11 Am. Jur. 983, Const'l Law, Sec. 254.

The so-called veto power which Petitioner urges as the saving clause for the Compact may in practical effect amount to the greatest vice inherent in it. Improper tactics such as "log-rolling" may very well in practice determine what orders, if any, of the Commission are enforced. Such a practice would not comport with the American system of government, which in this instance at the very least would seem to require proper legislative standards and a definition of the duty owed by the Commissioners to the Federal Government and the respective States which they represent.

Again, however, it is the broad language of the surrender of the State's police power to the Commissioners individually under Section 5 of the Act which accentuates the vice inherent in the Compact.

In an effort to escape the conclusion that the enabling Act "went too far and surrendered too much" as decided by the State Court, it is argued that the Compact should not be taken at its face value as being plainly without limit as to duration, but should be interpreted, irrespective of its terms, so as to permit withdrawal by any State at will or at least within a reasonable period of time. To adopt such argument is to do violence to the terms of the Compact and the enabling Act. Furthermore, it cannot be denied that this Court has uniformly held that interstate compacts once entered into within the limitations imposed by State Constitutions are within the protection of the contract clause of the Federal Constitution and will be specifically enforced within the original jurisdiction of this Court.

Virginia v. *West Virginia*, 246 U. S. 565, 62 L. ed. 883;

Olin v. *Kitzmiller*, 259 U. S. 260, 66 L. ed. 930;

Pennsylvania v. *Wheeling Bridge Co.*, 13 How. 518, 14 L. ed. 249;

Richmonds etc. R. Co. v. *Louisa R. Co.*, 13 How. 71, 14 L. ed. 55; and

Green v. *Biddle*, 8 Wheat. 1, 5 L. ed. 547.

If any State defaulted under the instant Compact, Petitioner and *amici curiae* would be the first to urge that action be taken to hold the Compact perpetually binding and enforceable against such recalcitrant State. Both law and fact refute the theory that by construction can the enabling Act in question be sustained.

III.

THIS COURT WILL NOT REVIEW THE JUDGMENT OF A STATE COURT ON THE VALIDITY OF AN ACT OF ITS LEGISLATURE UNDER THE CONSTITUTION OF THAT STATE.

1. This Court does not take jurisdiction to review a decision of a State court where a Federal right has not been adequately assigned.

This Court will not review a decision of a State court unless it is clear that a Federal question was affirmatively presented to the State court and has been assigned as error. It is essential to the jurisdiction of the Court that it be shown upon the record that the highest court of a State has first been apprised of a Federal question; and there must be an explicit and timely insistence of a Federal right in the court below.

Charleston Federal Savings & Loan Association v. *Alderson*, 324 U. S. 182, 89 L. ed. 857;

Congress of Industrial Organizations v. *Mc Adory*, 325 U. S. 472, 89 L. ed. 1741.

As late as 1945 Mr. Justice Douglas unequivocally specifies the rule which this Court has always adhered to in this cogent language:

"* * * It is a well established principle of this Court that before we will review a decision of a

> state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman* v. *Hanan*, 300 U. S. 14, 18, 81 L. ed. 476, 478, 57 S. Ct. 350; *Lynch* v. *New York*, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16"; *Williams* v. *Kaiser*, 323 U. S. 470, 76, 89 L. ed. 398, 401.

An analysis of collected cases on this point (see Annotation, 84 L. ed. 925) reveals that before this Court will review the decision of a State court on certiorari, Petitioner must assert and prove: (1) that a Federal question was raised below, (2) that this Federal question was decided, and (3) that the decision of the question was necessary to the determination of the case.

Petitioner utterly fails to comply with these well defined requirements expressly designated by the Court as conditions precedent to judicial review. It *does not* and *cannot* assert that a Federal question was raised below, for at no place in the Record does any claim of a Federal right appear. Now, for the first time, Petitioner attempts to invoke a Federal question and seeks vicariously to attribute it to the proceedings below, although any Federal right is conspicuously absent from the entire proceedings below. Nor can Petitioner validly claim that a Federal question was decided when the West Virginia Court specifically states that its decision is limited to passing on the validity of a State statute.

Moreover, it is a familiar rule, consistently followed, that in case of applications for certiorari to a State court, this Court will not pass upon or consider Federal questions not assigned as error or designated in the points to be relied upon, even though properly presented to and passed upon by the State court.

Flournoy v. *Wiener*, 321 U. S. 252, 88 L. ed. 708;

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 179, 82 L. ed. 1273;

National Licorice Co. v. *National Labor Relations Bd.*, 309 U. S. 350, 357, 84 L. ed. 799, 807.

Nowhere in Petitioner's brief is there any specification of assignments of error as to what Federal rights were denied or misconstrued by the State Court. Rule 9 of this Court requires Petitioner in all cases to file assignments of error "which shall set out separately and particularly each error asserted", and paragraph 9 of Rule 13, requiring the statement of points to be relied upon, provides that "The Court will consider nothing but the points of law so stated." Petitioner ignores this mandate and fails to meet either the substantive or the procedural requirements for the adequate assignment of a Federal right.

2. This Court will not review judgments of State courts that rest upon adequate and independent State grounds.

Respondent respectfully contends that there were no Federal questions either raised or decided by the Court below. But should this contention not be accepted, the instant judgment should nevertheless not be reviewed by reason of separate but equally compelling rulings.

This Court has specifically held that where the decision of a State court may rest on either a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it.

Williams v. *Kaiser*, *supra*, p. 19;

Lynch v. *New York*, *supra*, p. 19; and

Walter A. Wood Mowing & Reaping Mach. Co. v. *Skinner*, 139 U. S. 293, 35 L. ed. 193.

Thus, even where there is a question of whether a Federal right is involved, the issue is resolved on non-Federal grounds if the judgment can be supported on adequate State grounds.

The reasons for this holding and the reluctance of this Court to exercise its powers of judicial review when confronted by such a problem are excellently stated in two leading opinions. In the case of *Herb* v. *Pitcairn*, 324 U. S. 118, 126, 89 L. ed. 790, 794, Mr. Justice Jackson states:

> "This Court, from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock* v. *Memphis*, 20 Wall (US) 590, 636, 22 L. ed. 429, 444; *Berea College* v. *Kentucky*, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 S. Ct. 33; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 61 L. ed. 644, 648, 37 S. Ct. 318; *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 80 L. ed. 158, 56 S. Ct. 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. * * *"

Mr. Justice Frankfurter, dissenting in *Flournoy* v. *Wiener*, *supra*, p. 20, points out:

> "We do not review a case from a state court which can be supported on a non-federal ground because federal authority ought not to intrude upon the domain of the States. This far-reaching political consideration was decisive even after the Civil War in settling the rule that not only do we not review a case from a state court that can rest on a purely state ground, but we do not even review state questions in a case that is properly here from a state court on a federal ground. * * *"

This rule that the Court will not review a State decision resting on an adequate and independent non-Federal ground remains inviolate even though the State court may have also summoned to its support an erroneous view of the Federal law. *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 89 L. ed. 2092.

It is difficult to see how Petitioner can evade or distinguish this clear and specific rule in asking this Court to review the decision of the West Virginia Court. Petitioner bases his assertion of a Federal question upon an alleged construction of the Compact by the West Virginia Supreme Court. Such was not the case, as shown by the specific limitation of the holding to the constitutionality of the major vices inherent in the enabling Act. But even if there was incidental consideration of the Compact, the fact remains that the decision rests unequivocally upon non-Federal grounds: the capacity of a State Legislature to contract under its own Constitution, and hence falls squarely within the stated rule.

3. The State Court is final and exclusive arbiter of internal fiscal affairs and of delegation of the State's police power.

This Court has consistently held that it is without jurisdiction on certiorari to review holdings of a State court which concern matters of State law and amount, at most, to alleged erroneous construction of statutes or Constitutions of a State by its own courts. *Neblett* v. *Carpenter*, 305 U. S. 297, 83 L. ed. 182, and cases cited *supra*, p. 21.

A question of illegal delegation of legislative power to State bodies or officers or to the people does not raise a Federal question but is a matter of local concern and for State courts. *Ohio Ex Rel. Davis* v. *Hildebrant*, 241 U. S. 565, 60 L. ed. 1172.

Respecting the fiscal affairs of a State, the decision of a State court holding unconstitutional a statute increas-

ing the debt of the State involves no Federal question for review. *Salomon* v. *Graham*, 15 Wall. 208, 21 L. ed. 37; *King* v. *West Virginia*, 216 U. S. 92, 54 L. ed. 396.

Petitioner relies upon *Kentucky* v. *Indiana*, 281 U. S. 163; 74 L. ed. 784. (Br. p. 11). That case is not relevant here because the issue was squarely raised as to the *validity* of a contract between the two States for the construction of a bridge, and was brought in this Court to settle a controversy between States within its original jurisdiction upon the principles governing such cases, decided in *North Dakota* v. *Minnesota*, 263 U. S. 365, 68 L. ed. 342. The defendant, Indiana, by answer admitted the validity of the compact, although some citizens of that State had sought to enjoin performance of the agreement upon wholly unspecified grounds. That case did not deal with the question of review of a State court's decision on the State constitutionality of an enabling act to make a compact. As distinguished from the instant controversy where no dispute exists between States, no question of the validity of a compact is involved and the issue being simply the capacity of the State Legislature under its Constitution to pass the enabling Act, it is plain that such case is neither applicable to nor decisive of the instant matter.

4. A State must compact in conformity with its Constitution, notwithstanding consent of Congress.

Petitioner misconceives the very essence of the Constitution of the United States dealing with the right of States to compact.

Article I, § 10, Clause 3 of the Constitution of the United States merely provides that "No State shall, without the Consent of the Congress, * * *, enter into any Agreement or Compact with another State, * * *." Manifestly, this provision does no more than require congressional consent to the formation of interstate compacts.

The Declaration of Independence established the sovereignty of the States and they were thereafter perfectly free and competent to compact with each other without restraint, save as provided in their own Constitutions. The Federal Constitution is not the source of the power of the respective States to contract with each other. Both historically and by its very phraseology Clause 3 is but a limitation upon the States requiring them merely to secure congressional consent before a compact is valid. This Court has recognized that the obvious reason for requiring congressional consent is to prevent the States from entering into political alliances or other encroachments in the Federal sphere and has properly considered consent as a matter that may be implied without formal act in many cases.

Wharton v. *Wise*, 153 U. S. 155, 38 L. ed. 669;

Virginia v. *Tennessee*, 148 U. S. 503, 37 L. ed. 537;

Virginia v. *West Virginia*, 11 Wall. 39, 20 L. ed. 67.

The language of the Constitution does not permit of an interpretation whereby the Congress can, in effect, force or coerce a State to enter into a compact.

It is unthinkable in the instant case that the Congress and the parties to the Compact did not expect each State Legislature acting thereon to do so within the legitimate framework of its Constitution. The Legislature has no existence, no power or vitality of any kind except under and by virtue of the Constitution of the State of West Virginia. The State Constitution is the source of legislative power and provides general principles governing its action. For example, under the West Virginia Constitution a bill must be read upon three separate occasions before passage in order to be valid. Let us suppose that

in the enactment of the questioned statute this requirement had not been met, and under State law such enactment would be utterly void. Could the invalidity of the enabling Act be questioned under such circumstances? There is but one answer supported by reason and authority—the enabling Act in the instant case, irrespective of congressional consent (to the Compact, not the Act as a whole), was subject to constitutional limitations.

Petitioner relies heavily upon *Hinderlider* v. *LaPlata Co.*, 304 U. S. 92, 82 L. ed. 1203 (1938) (Br. p. 10); yet, this case recognizes that an interstate compact may not be constitutional if there is "* * * in the proceedings leading up to the compact or in its application some vitiating infirmity." The Court in that case remarks that no such infirmity or illegality is shown, but by implication it is clear that by reason of the limitation of a State Constitution there well could be some vitiating illegality which would render an interstate compact null and void. This position is further supported by *United States* v. *Bekins*, 304 U. S. 27, 82 L. ed. 1137, 1144, in which a statute is upheld because it "* * * is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs."

The case of *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565, clearly indicates that a compact to be valid must comply with both the Constitution of the United States and the Constitution of any State which joins therein.

> "The states of the Union are restricted in their powers to make agreements with other states by the United States Constitution, as well as by various state constitutional provisions." Annotation 134 A. L. R. 1411, 1412, and cases there cited.

In 37 Michigan Law Review 129, 130, 131, (1938) commenting upon the *Hinderlider* case, *supra*, G. M. Stevens cogently states:

> "Congressional assent does not make it a law of the United States. For the requirement of Congressional assent is not a grant of legislative power to Congress, but a limitation on an inherent power of the States. This interpretation is particularly emphasized by the doctrine that not all compacts need Congressional ratification. *It seems, then, that interstate compacts are essentially legislative acts of the signatory States and should be subject to the ordinary Constitutional restraints placed upon such legislation.*" (Italics supplied.)

The Supreme Court of California upheld the creation of a State commission on interstate cooperation because its duties were properly limited to collecting information and making recommendations to the Legislature. *Parker* v. *Riley*, 18 Cal. (2d) 57, 113 P. (2d) 873, 134 A. L. R. 1405.

In *New York* v. *Wilcox*, 115 Misc. 351, 189 N. Y. S. 724, a compact between New York and New Jersey, dealing with the important development of the Port of New York, was upheld because the joint Port Authority was merely authorized to prepare rules and regulations which each State should adopt and for the specific reason that each State retained strictly its own sovereignty, no control having been given to the Port Authority over any property belonging to either State or the citizens thereof.

Upon adoption of the Federal Constitution, the States retained all their original sovereignty except that surrendered to the Federal Government. *Presser* v. *Illinois*, 116 U. S. 252, 29 L. ed. 615. As the Supreme Court of West Virginia has remarked, the doctrine of a higher law than the Constitution has no place in American jurisprudence. *State* v. *Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000.

IV.

PETITIONER POSES GRAVE THREATS TO STATE SOVEREIGNTY AND THE CONTINUED EXISTENCE OF THE FEDERAL SYSTEM.

Petitioner boldly asserts that if Congress approves an interstate compact State Constitutions automatically lose their force and vitality and, paradoxically, the Legislature, although the creature of the State Constitution can validly pass legislation wholly without regard to prohibitions of the State Constitution. This notion of Petitioner, which is its major premise for reversal of the State Court, involves many novel features: first, it is claimed that the provisions of Article I, § 10, Clause 3 of the Federal Constitution, contrary to its very terms, must be read as an affirmative grant of power, free from any and all restraint of any kind, to the States to enter into interstate compacts, subject only to the necessity of congressional approval; secondly, that the Federal Constitution, so twisted in meaning, then necessarily takes precedence over all State statutes and Constitutions; and finally, that any attempt of a State to invoke its Constitution must fail because of conflict with the Constitution of the United States.

In fairness to Petitioner, it should be noted that its brief concedes that there are no cases expressing such doctrine. At the same time, Petitioner urges that its theory is supported inferentially by scholarly writings and decisions of this Court. Petitioner uproots from its context a quotation from the article by Frankfurter and Landis, *supra*, p. 8, and seeks to torture it favorably to Petitioner's view. Such quotation is in reality but an emphatic affirmation of the inherent sovereign powers of the States to compact under our Federal system, subject only to congressional approval.

The weakness and inconsistency of its theory is revealed by Petitioner's quotation from *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, *supra*, p. 17, (Br. p. 12) that: "This compact, by the sanction of Congress, has become a law of the Union." This dictum has been long since rejected and the very case upon which Petitioner places especial reliance, *Hinderlider* v. *LaPlata Co.*, *supra*, expressly upheld a long line of decisions unequivocally deciding that congressional consent does not make a compact a "statute of the United States" within the meaning of the Judicial Code.

Petitioner's argument that compacts can be practicable and effective only if it is unequivocally established (by this Court) that all of the States are vested with equal powers free and unlimited by their respective Constitutions and the decisions of their local courts ignores the very real fact that compacts have been practical and effective throughout our history, although drafted strictly within the limitations of both State and Federal Constitutions. Under Petitioner's theory, providing only that Congress gave consent, a group of States could ignore their respective Constitutions and the executive and judicial branches of their governments and by mere legislative action, free from all limitation of every kind, by interstate compact establish a revolutionary form of government consisting only of the legislative branch, membership in which could be upon a lifetime basis.

This Court will not make a new compact for the States by the process of spurious interpretation.

The urging upon this Court of a multitude of interpretations and constructions would seem to be a tacit recognition and admission that the Compact in its present form is in fact unconstitutional. These pleas for "watering-down" the terms of the Compact are, in the view of Respondent, irrelevant to the issue, which relates to the

capacity of the West Virginia Legislature to pass upon the whole of Chapter 38, Acts of the Legislature, 1939, and not merely the Compact which contains in far less degree the vices complained of. Moreover, it is plain that the Compact itself is free from such ambiguities as warrant invoking the canons of construction and interpretation. Certainly, the suggested interpretations are tantamount to the making of a new contract between the parties, which it is respectfully submitted this Court will not and should not do. The instant Compact, unlike many others, is not designed to settle an existing controversy, nor does it deal with conflicts between the States. On the contrary, its operation will be prospective and no rights have accrued thereunder. Under these circumstances, it would seem plain that the parties by simple amendment to the Compact can incorporate the suggested interpretations made in this case, thus bringing the Compact within the limitations of the Constitution of West Virginia and all the other States. *A fortiori* a proper enabling act is needed for the State of West Virginia.

The problem of controlling pollution in the Ohio River Basin will become increasingly difficult with the passage of time. Interstate compacts may or may not prove to be an effective device for dealing with that important problem.

If it is not effective, the States signatory thereto should be free to try other methods and not be bound by the fossilized terms of an outworn compact. Each State must remain free to experiment with new devices to meet the ever changing problem. In this connection the *Water Pollution Control Act of 1948* urges the States to consider and adopt *uniform legislation* to deal with stream pollution. 62 Stat. 1155, Public Law 845, 80th Congress.

Respondent's sole interest in this case is that of performing his sworn duty to assure that the public funds of

West Virginia are expended solely in accordance with the Constitution and statutes of that State.† The observance of that duty is not only essential for the preservation of orderly and constitutional government, but it is submitted in this instance may lead to the formation of a proper and more effective Compact for purifying the waters of the Ohio Basin.

CONCLUSION

For the reasons and in accordance with the constitutional provisions and authorities relied upon, Respondent respectfully submits that the jurisdiction of this Court has been improperly invoked, and, moreover, the State Court should be affirmed on the merits.

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Attorney for Respondent.

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† Article VII, § 1 of the Constitution of West Virginia provides: "The executive department shall consist of a governor, secretary of state, state superintendent of free schools, auditor, treasurer, commissioner of agriculture and attorney general, * * *." These are state-wide elective offices.

The Code of West Virginia, 12-3-1 (Michie's 1949, § 1019) provides:

> "Manner of Payment from Treasury; Form of Checks.— Every person claiming to receive money from the treasury of the State shall apply to the auditor for a warrant for same. The auditor shall thereupon examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, and for so much thereof as he shall find to be justly due from the State, if payment thereof be authorized by law, and if there be an appropriation not exhausted or expired out of which it is properly payable, he shall issue his warrant on the treasurer. * * *."

See *Robinson* v. *LaFollette*, 46 W. Va. 565, 568, 33 S. E. 288, which states: "* * * he (Auditor) is authorized to use *discretion* * * * and in passing on such claims he does not perform a mere ministerial duty * * *." (Italics supplied.) *Woodall* v. *Darst*, 71 W. Va. 350, 77 S. E. 264, holds: "* * *. The Auditor has the right to raise the constitutionality of the appropriation." See also *Huntington* v. *Worthen*, 120 U. S. 97, 30 L. ed. 588.